INDEX.

TABLE OF CASES CITED.

SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 121.

THOMAS N. BRADY,
Appellant,
v.
HUBERT WORK,
Secretary of the Interior,
and
WILLIAM SPRY,
Commissioner of the General Land Office,
Appellees.

BRIEF FOR APPELANT.

THE FACTS.

This is an action commenced in the Supreme Court of the District of Columbia against the Secretary of the Interior and the Commissioner of the General Land Office to compel them by writ of mandamus to restore and allow his valid, vested homestead claim illegally and wrongfully cancelled by them, and to

compel them to give him the notice specifically required by statute, of his preference right of entry based on his successful contest and full compliance with the law in securing the cancellation of contest in all things regular, of the entry of Rudolph L. Larson for the land involved, and a prayer to the court to enjoint them from disturbing the *status quo* by further clouding his right and title to the land legally acquired under the specific provision of the statute, and therefore, not within their power and absolutely void.

There is little dispute about the facts. Hearing was had upon Brady's contest against Larson's entry. The issues were made up by Larson's answer to the contest affidavit. One day before the date of final hearing, Lilly S. Harner was allowed to intervene upon petition that day filed, claiming to be the deserted wife of Harry S. Harner, who had contested the entry of William R. Rattskammer, but who although duly notified of his thirty days preference right to make entry, failed and has ever since failed to do so.

The entry of Larson was cancelled on the contest of Brady, but in the face of this record, Brady's application to enter under his successful contest, as well as his prior residence on the land with his family when it was legally open thereto, was denied and the land illegally and wrongfully awarded to Lilly S. Harner.

Brady duly and legally exhausted all his rights of appeal, including denial of petition to the Secretary of the Interior for the exercise of his supervisory authority, all which were decided against him. Suit was commenced in the Supreme Court of this District against these officers, involving only their official acts, which upon their motion to dismiss, was allowed and decision and judgment rendered against the appellant.

Subsequently in due time and accordance with the rules of the Courts, appeal was duly taken to the Court of Appeals of this District, which court, likewise sustained the motion to dismiss the complaint, from which final action by said court appeal was duly and regularly taken to this court, which brings the case before this court for consideration and decision.

QUESTIONS INVOLVED.

The motion of appellees to dismiss, raised three questions, viz.

1. That the action involves the direct review of the action of these officers involving matters of discretion in which the court has no jurisdiction to control.
2. Defect of parties and
3. That appelant would have an adequate remedy at law. This motion was sustained by the Court and judgment rendered against appellant from which this appeal was taken.

The following errors are assigned in the appeal to this Court:

"1. The court erred in rendering judgment for the defendants.

"2. The court erred in not rendering judgment for the plaintiff.

"3. The court erred in sustaining the motion of the defendants to dismiss the plaintiff's complaint for any or all of the reasons in said motion stated, or for any other reason.

"4. The court erred in not holding the action of the defendants in denying the plaintiff the statutory preference right of entry given him thereby to enter the

land involved upon the cancellation of the entry of Rudolph Larson on his contest, which action being beyond the power of the defendants was illegal, wrongful, arbitrary, capricious and absolutely void.

"5. The court erred in not holding the defendants illegally, wrongfully, arbitrarily and capriciously allowed Lillie S. Harner the right to make entry of the land as a deserted wife.

"6. The court erred in failing to grant the injunction prayed for by plaintiff and in dismsising his Bill of Complaint.

"7. Other errors appearing upon the face of the record."

These assignments of error, together with the Complaint, motion to dismiss and judgment of the Court of Appeals, constitute the record proper, before the Court, and in the last analysis raise the following questions:

(A) Is a person not a resident of the District, the Courts of which alone have jurisdiction of actions against the Secretary of the Interior or Commissioner of the General Land Office, for mandamus and injunction in their official actions, in a statutory proceeding specifically prescribing the rights of a contestant under the Act of May 8, 1880, permitted to intervene after issue joined, and to set up a claim under an entirely different special statute, confined to a small specific class of persons and necessarily involving a strict construction, and which involves *no question* in the then pending action, which might be properly decided between the contestant and the entryman, when such claim is asserted by these officers only, and, made a party, and such intervenor fails and refuses to appear, is there any possible way of getting such an one into the court; or must the parties lose their remedy when they have a legal vested right

that it might protect these officials in their illegal acts? Or, should the issues involved in the contest which do not involve any rights of such person, be decided between the other parties thereto.

(B) Can executive officers ignore the plain unambiguous provisions of the statute prescribing the method of disposition of the public lands and claim it as an exercise of discretion when none is given by the law?

(C) Could Lilly S. Harner defeat the statutory right of the appellant, under her petition to intervene under the only statute permitting her to complete her deserted husband's claim, and which under all decisions requires strict construction, viz, the Act of October 22, 1914, (38 Stat. 66) *without bringing herself within any of its requirements, and thus defeat the statutory vested rights of a settler and resident on the land and the preference right of a contestant against the entryman?*

Unless some one of these questions raised by the motion of appellees can be sustained by the Court, the prayer of the appellant in his complaint should be allowed, as the motion admits the facts therein stated.

The statutes involved are the following:

The Act of May 8, 1880, which is as follows:

> "Sec. 2. In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land-office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said land. * * * * * * *
>
> "Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public

lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land-office, as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he had settled under the pre-emption law."

The land involved is Lots 6 and 7 and the E.2 S. W.4 Sec. 6, T. 1 N., R. 6 E., G. and S. R. M., Phoenix, Arizona, land district.

The Act of October 22, 1914 (38 St. 736) is as follows:

"That in any case in which persons have regularly initiated claims to public lands as settlers thereon under the provisions of the homestead laws and the wife of such homestead settler or entryman, while residing upon the homestead claim and prior to submission of final proof of residence, cultivation, and improvement as prescribed by law, has been abandoned and deserted by her husband for a period of more than one year, the deserted wife shall, upon establishing the fact of such abandonment or desertion to the satisfaction of the Secretary of the Interior, be entitled to submit proof upon such claim and obtain patent therefor in her name in the form, manner and subject to the conditions prescribed in in section twenty-two hundred and ninety-one of the Revised Statutes of the United States and acts supplemental thereto and amendatory thereof: *Provided,* That in such cases the wife shall be required to show residence upon, cultivation, and improvement of the homestead by herself for such time as when, added to the time during which her husband prior to desertion had complied with the law, would aggregate the full amount of residence, improvement, and cultivation required by law: *And Provided further,* That the published

and posted notices of intention to submit final proof in such cases shall recite the fact that the proof is to be offered and patent sought by applicant as a deserted wife, and, prior to its submission, notice thereof shall be served upon the husband of the applicant in such a manner and under such rules and regulations as the Secretary of the Interior shall prescribe."

ARGUMENT.

Since, under the decision of the Interior Department and that of the Supreme Court of the District of Columbia, affirmed by the Court of Appeals, neither of which courts rendered an opinion, are made to turn mainly upon the absence of Lilly S. Harner, the intervener as a party, we will take up that question first. In her individual capacity, it is not claimed she had or has any right, legal or equitable, unless the averments of the complaint show she brought herself clearly within the specific requirements of the Act of October 22, 1914, which being a statute granting a special privilege against others seeking to appropriate public lands, giving a new and unusual remedy and specifying how it is to be enforced, should be strictly construed; and the validity of all acts done under authority of such an Act will *depend upon a compliance with its terms.*

Idaho v. Northern Pacific Ry. Co. 42 L. D. 118, quoting Campbellsville Lumber Co. v. Hubbard 112 Fed. 718, by Judge (later Justice) Lorton and concurred in by Judge (later Justice) Day; Northern Pacific Ry. Co. 40 L. D. 441; Wisconsin Central Railroad Co. v. United States 154 U. S. 100; Hannibal & St. J. R. Co. v. Missouri River Packet Co. 125 U. S. 260.

To have any valid claim she must have established the following facts: She must have been legally abandoned by her husband for more than one year; the

abandonment or desertion must have been from the land involved, and she must have continued her residence thereon; and completed the period required under the law.

The complaint alleges:

> "That neither the intervenor nor her husband could acquire any right to the land by any residence they may have had on it while covered by the uncancelled entry of Rattkammer; and any residence they may have had between the date said entry was cancelled on the record of the local officers and the date they abandoned it and removed therefrom inured to the husband alone, in no wise gave her any separate right whatever, to make entry of the land in her own name."
>
> Tr. Par. 25.
>
> "The plaintiff says that even though the intervenor had been deserted at the time when, and from a home in another place where they were then living together as husband and wife, she could get no right as a deserted wife under the Act of October 22, 1914, or under any other law and could not make an entry as such in her own name."
>
> Tr. Par. 26.

The special Circular issued by the Interior Department dated November 13, 1914, No. 364, 43 L. D. 445, prescribing the method of procedure by the wife to acquire title in her own name requires such wife to file an affidavit alleging desertion as stated in the act, and all information in her possession as to the entryman's whereabouts, with the Register, who is required to issue a summons and deliver it to the wife (prescribing its form) allowing the husband 30 days after notice to file denial of the charges; if denial is filed a hearing shall take place. If personal service cannot be had, the summons must be sent by registered mail to the last known address of entryman. After the expiration of

30 days from personal service or 40 days from date of mailing unless denial is sooner filed, the Register will issue notice of making final proof by the wife in her own name. These requirements must be strictly complied with even where there are no adverse rights or claims, before she can make final proof in her own name.

This circular closely followed the requirements of the Act, which as we have shown, requires a strict construction. But in this case, where there were other valid vested rights, they were not met.

43 L. D. 445; French v. Edwards, 12 Wall. 506-20 L. Ed. 702 and cases following it.

None of these steps were taken in this case. Neither the decision of the Register and Receiver, the Commissioner of the General Land Office, nor either of the three decisions of the Secretary of the Interior, contained any statement showing she had complied with either of these statutory requirements, carried into a circular of instructions for its execution. Nay more, no decision from and including that of the local officers, to and including the final denial by the Secretary of the second petition of the appellant for the exercise of his supervisory power, stated *a single one of the positive unambiguous requirements of the statute under which she claimed had been complied with.* The same is true as to the decisions of the Supreme Court and of the Court of Appeals of this District. The nearest approach to a finding or decision showing such compliance was that of the Register and Receiver who, April 30, 1919, after summing up the evidence at the hearing, found as to her claim as follows:

> "The case is so complicated that it is hard to arrive at the legal status. However, we are of the opinion that Mrs. Harner has more right to the

land than the contestant or the contestee."

It must have been upon this principle, of shutting their eyes to the facts, worse even, *refusing* to state them, when pressed in argument, upon the theory that the strict terms of this special statute could be ignored, the legal rights of others taken away, in open defiance of its provisions, by executive officers whose sworn duty it is to comply with the law, and who are without power to grant title to a single acre of public land except under its precise terms. And now, the Courts of the District, refraining also from stating the law, upon which their decisions rest, hold, in effect, that these decisions disregarding all law, and taking the property of one person, and giving it to another is within the "discretion of these executive officers" and is not "capricious or arbitrary." On the contrary, there is no rule or regulation under which, taking the facts as admitted by Mrs. Harner in her petition for the right to intervene, and her testimony at the hearing, upon which she could predicate a right against the government, much less against a prior valid settler and resident, who contested an illegal entry. No answer to this proposition could be more appropriate than the decision of the great Chief Justice Marshall, in the celebrated and oft approvingly quoted case of Marbury v. Madison (1st Cranch, 137) as follows:

> "It is a settled and fundamental principle that every right, when withheld, must have a remedy and every injury, its proper redress. There are some injuries which can only be redressed by writ of mandamus and others by a writ of prohibition. There must, then, be a jurisdiction somewhere competent to issue that kind of process."

He also quotes as follows:

"Mandamus lies if there be a legal right and a remedy in equity." 3 Term Reports, 652.

As to our system the court, answering its own question, whether if a person has a right, and the right has been violated, the courts of his country afford him a remedy, said:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

"If this obloquy is to be cast on the jurisprudence of the country, it must arise from the peculiar character of the case."

After distinguishing between purely political cases in which the President alone acts, it is said:

"But when the legislature proceeds to impose on that office (the Secretary of State) other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot *at his discretion sport away the vested rights of others.*" (Italics ours)

Or, of the case of Vattier v. Hinds, (7 Pet. 252) decided thirty years later, as follows:

"This certificate applies to the state of parties at the time of the decree, and affirms this principle. If the defendants have distinct interests, so

that substantial justice can be done by decreeing for or against one or more of them, over whom the court has jurisdiction, without affecting the interest of the others, its jurisdiction may be exercised as to them. * * * * * * * It is the settled practice in the courts of the United States, if the case can be decided on its merits between those who are regularly before them, to decree as between them. Although other persons, not within their jurisdiction, may be collaterally or incidentally concerned, who must have been made parties had they been amenable to its process, this circumstance shall not expel other suitors who have a constitutional and legal right to submit their case to a court of the United States, provided the decree may be made without affecting these interests," and decisions cited,

followed by the later case of Roberts v. United States, (176 U. S. 221) by Mr. Justice Peckham, quoted approvingly by Mr. Justice Van Devanter in the case of Lane v. Hoglund (244 U. S. 174) as follows:

"Unless the writ of mandamus is to become practically valueless, and is to be refused everywhere a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. * * * If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of language by the officer. Unless this be so, the value of this writ is very greatly impaired. * * * * * Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the per-

formance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, *no matter how plain its language nor how plainly they violated their duty* in refusing to perform the act required." (Italics ours)

Se also U. S. v. Black (128 U. S. 40) wherein it is said:

"When they refuse to act in a given case at all, or when by special statute or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them. * * * *

"There is no room for the exercise of any discretion, official or otherwise; *all of that is shut out by the direct and positive command of the law,* and the act required to be done is, in every just sense, *a mere ministerial duty.*" (Italics ours)

But if these decisions left any doubt as to the power of executive officers to ignore the plain, unambiguous laguage of the law, making specific requirements, upon the ground of "discretionary power," it would seem the plain, incisive, most convincing language of the late Chief Justice White in the case of Daniels v. Wagner (227 U. S. 547) would have operated to prevent such decisions as those in this case. The striking language of the Court in that case is:

"When these conclusions are accepted it results that the claim of discretionary power is substantially this: 'That in a case where, under an Act of Congress, a right is conferred to make an application to enter public land, and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. And it becomes, more-

over, certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by unlimited and undefined discretion which is vested in law in the administrative officers for the purpose of giving effect to the law."

The doctrine of this case has been followed ever since its date and it has been quoted approvingly in nearly all of them.

> Nolan vs. Carr (125 U. S. 618); N. P. R. Co. vs. McComas (250 U. S. 387); Payne vs. Central Pacific Ry Co., decided Feb. 8, 1921, 255 U. S. 228) and cases cited and approved.

Mrs. Harner testified, and it is admitted, she and her husband abandoned the land, leaving the house unoccupied about April, 1918, because they could not make a living upon it and removed to a ranch near Glendale, some distance away; that neither of them ever returned to live upon it; that without her knowledge her husband rented the small patch of alfalfa to a Mr. Brown, at whose house Brady was then living, which she discovered from his papers after he left home to go East and raise money to buy the ranch upon which they were living at Glendale; that there was no quarrel, and at the time he left her, no difference between them, but that she did not believe he could succeed in getting the money; that she had letters from him only a few weeks before the hearing, which under subpoena by the local officers, she was compelled to bring into court, which she did, *but refused to sub-*

mit such letter or letters, or to state their contents. There can be only one reason for this refusal and that is, they would not bear out her charge that she had been deserted. She preferred to defy the court, depending upon its leniency, and it seems she was justified in doing so. No action of the court followed this refusal but her testimony was considered. That he left for the East the middle of September, 1918, and in the middle of November she went over to Chandler; that her husband again without her knowledge until Brown testified at the hearing, re-rented the alfalfa patch to Brown.

IV.

First, from these admitted facts and her refusal to obey the order of the local officers to submit his letters recently received, while claiming she was deserted, she utterly failed to prove she was deserted, and deserved punishment for contempt, and the ignoring of her claim.

Second. Even if he had deserted her as claimed, the middle of September, 1918, one year, the period of desertion required by the statute to be shown, had not expired April 14, 1919, when she filed her application to intervene, or the next day when the hearing took place. Therefore, there was no desertion as the statute requires to give her the status of a deserted wife under the Act of 1914. *This alone should have required the denial of her application and its dismissal.*

Third. But, if the desertion for one year had been fully proven, or admitted, the most essential requirement of the statute, viz. the continuation of her residence on the land and the completion of the residence of her husband required by the law, was not shown, but it was admitted she resided at Glendale

and other places remote from the land both before and after her husband, without her knowledge, had for two successive seasons rented the small alfalfa field. Not only are these facts undisputed, but no decision of the officials of the Interior Department or its branches, nor of either of the local courts, sets out, or specifically asserts *she complied with either of these statutory requirements.* And yet, we are told none of them are "arbitrary or capricious." But, in fact they are even worse than this, for, as held in the case of Interstate Commerce Commission v. L. N. Ry. Co. (227 U. S. 88, 57 L. Ed. 431)

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commissioner had a *power possessed by no other officer, administrative body, or tribunal under our government.*"

Is this not clearly applicable?

V.

But it is claimed that so far as remaining on the land and the completion by the deserted wife of the residence required by the Homestead Law, the residence of Harner and his wife on the land from April, 1915, to April, 1918, was a completion of the three years required by that law, and, therefore, this most essential requirement may be treated as if it did not exist and that the plain requirement that she should have been *deserted from the land,* is essential only when the full period of residence had not been completed. Even if this disregard of a positive provision of a special statute could be tolerated, the law as applied to the admitted facts in this case, leaves no doubt that further residence was *essential.* What are the facts? October

27, 1915, Harry S. Harner filed contest against the entry of Rattkammer, which was made by him November 10, 1913. This entry was cancelled on this contest January 6, 1916, entry cancelled and notice to Harner January 12, 1916, that land was subject to his preference right, but not open to entry, but notice of right to enter given December 27, 1918, which was never exercised.

Under the uniform decisions of the Department, prior to and certainly from the decision of Secretary Teller, (1st L. D. 362), in the case of Graham v. Hastings and Dakota Ry. Co., decided February 12, 1883, until the present time, as held by him in that case, viz.:

> "On the other hand, it has always been the invariable custom of the Department to regard land appropriated under the homestead law as removed from pre-emption settlement and homestead entry and not again subject to either until the homestead entry is cancelled * * * * Until after the expiration of the period in which the settlement and improvement can be proven, the government presumes that the homestead claimant is acting in good faith, unless the contrary be shown in the manner prescribed by the statute; but until such showing a forfeiture cannot be declared."

This decision was followed by the same official in the case of Whitney v. Maxwell (2 L. D. 98) wherein it is said:

> "The case of Gohman v. Ford (Copp, April, 1881), and subsequent decisions of the Department, are to the effect that a *contestant acquires no right* under the Act of May 14, 1880, *or other law*, prior to the cancellation of of the entry he contests."

These early decisions are followed by Acting Secretary Muldrew in the case of Turner v. Robinson (3 L. D. 562), dated May 27, 1885, wherein it is held:

> "It is well settled that a homestead entry segregates the land covered thereby, and that acts which could constitute settlement, if the land was unappropriated, *can give no legal right,* so long as the entry remains uncancelled. McAnnery v. McNamara, 3 L. D. 552." (Italic ours)

See also McKibben v. Dower 3 L. D. 565; Turner v. Robinson, 3 L. D. 563; Swanson v. Simmons, 16 L. D. 44; Hall et al. v. Stone 16 L. D. 199; McGuire v. Rogers, 297; Wilcox v. Jackson 38 U. S. 13 Pet. 498; Hodges v. Colcord 193 U. S. 192; Gilbert v. Spearing 4 L. D. 463.

It is clear therefore that during the first nine months Harner and his wife resided upon the land it was covered by Rattskammer's entry counting from the beginning of their residence, April, 1915, until the cancellation of the entry January, 1916, leaving but two years and three months residence when the law requires three years. It follows, there is nothing in this contention.

VI.

If, then, under her own admissions she could under no circumstances make an entry in her own name, as contended for her, upon what theory can it be insisted she is a necessary party? Even if she had any rights flowing from this statute, they would have been entirely separate and distinct from the rights of Brady which arises from his compliance with an entirely different statute. Leaving her out of consideration in this proceeding between Brady and Larson can, therefore, do her no injury. If her husband had appeared

when she did and sought to make entry it could not have been allowed as against either Brady or Larson. He lost all his rights when he failed to apply to make entry under his preference right as a successful contestant within the 30 days after notice thereof, and if he could not have prevailed against Brady who was living on the land with his family, which was open to his settlement and residence, January 1, when he settled with his family, subject only to this preference right of Harner, and clear of that, at the moment of the expiration of the 30-day preference right period, and open to settlement and entry by him, or by any qualified person, free from all claims of either of the Harners, how could she, leaving out Brady's claim, have defeated Larson's entry, made at a time it would have been valid but for Brady's residence with his family acquire any right to the land? This would have precluded Harner from any right. It certainly would be a peculiar situation to hold, as it is held, that notwithstanding *he* would have had no rights against the government or either of these parties, *his wife* who was not and for a long time before Brady's settlement and residence, and after Larson's entry, an occupant of the land, have acquired any? How could *she* get more, or greater, rights, than *he* had, or could get? That, too, without compliance with any of the requirements of the only statute which could have given her any separate claim, even if there had been no adverse right or claim? These questions answer themselves. The stubborn facts that Brady was living on the land with his wife and children in the house he found vacant, making improvements; that at the date of his settlement it was open to his claim subject only to Harner's then unexpired preference right, which period we have shown expired without any attempt by him to exercise it while Brady

was living on the land, leaving his claim free from any and all rights or claims of Harner, and certainly of his wife as well, are admitted.

When Larson, thereafter, without investigation, suceeded in getting the local officers to permit him to make entry, which was illegal because the land was already occupied by Brady with his family, a fact of which the law compels him to take notice, and which required its cancellation in Brady's contest. Now it is contended that though occupied it was not settled upon and occupied by Brady as a homestead claimant but for another purpose. This contention was made by Larson as the only possible way his entry could be permitted to stand. While *this would have been no advantage to Mrs. Harner,* for the reason that if Brady's claim was illegal, *she would be met by Larson's* which was valid but for Brady's. To accomplish this, it was necessary to hold, first, that Larson's claim was invalid because of Brady's occupancy, of which he was required by law to take notice. And, that, although Brady's occupancy was sufficient to defeat Larson's entry it was not made in sufficient good faith to be permitted to stand and his contest was dismissed, after defeating Larson's entry. These officials must be given credit for great ingenuity in getting rid of a claim of a resident with his wife and children—a statutory right, which had done duty to defeat an entry, valid but for it; but not as against Mrs. Harner *who had no valid claim whatever.* Is it asked how this could have been done? Let the official decision of the Secretary of the Interior in the case answer it.

In letter transmtiting to the Department our second petition for the exercise by the Secretary of his supervisory power, we said:

"We are again appealing to the Department to re-examine the evidence in the transcript, especially as to the good faith of Brady. We have set it out in full and referred to pages, so our statement of the evidence can be verified with little labor. When it is considered the finding of facts by the Department is conclusive on the Courts, are we asking too much when *no decision* has set out any part of the evidence offered to sustain his presumptive good faith, in making settlement. It should not be forgotten either that a finding of bad faith in settlement is a stain upon the character of a settler, and should be legally made only upon the clearest preponderance of competent evidence in the record."

The evidence set out in this petition, copied from the transcript, showed that, beside Brady's testimony, John Bond, B. D. Steele, John Brown (subpoenaed by Mrs. Harner), and Hiram Brown, neighbors, and unimpeached witnesses each testified to statements made by Brady at different times shortly before his settlement, that *he intended to settle upon and enter the land, as he did not believe Harner would come back and exercise his preference right,* and he could get title to the land.

The answer by the Department to this petition is as follows:

"Just what Brady had in view when he moved upon the land, is from the record, vague and indefinite. Upon him was the necessity of establishing a valid settlement with the intention to claim the right to the land involved. He says that prior to going upon the land he heard two men say that the land could be taken but made no effort to ascertain whether settlement on the land could give him any right either before or after he moved into the Harner house and had not sought counsel or advice of attorney or official

until given notice to vacate by Larson, the entryman. In his testimony Brady says he used the words 'could get off' as distingiushed from the testimony of contestee that he said he 'would move off' and admits that he asserted no claim of right upon the land to Larson at any time, prior to the institution of this contest. His testimony at the hearing when he was vitally interested recites a mere occupation unattended by the natural inquiry and investigation, which any reasonable man would have made within 45 days which elapsed between his occupation and the entry of Larson. The record in this case does not justify this Department in reversing our decision in favor of Mrs. Harner, therefore, the petition is dismissed."

Not a line, word, or syllable as to the testimony of these four witnesses set out in full in our brief, proving positively he told each of them before he occupied the land that he intended to do so and get title under the homestead law. It did not fail to refer to the fact that there were four concurring decisions in favor of Mrs. Harner, that of the Register and Receiver being as follows:

"The case is so complicated that it is hard to arrive at the legal status. However, we are of opinion that Mrs. Harner has more right to the land that the contestant or the contestee. Her husband appears to have deserted her to escape punishment for a felony."

The Commissioner's decision, quoted approvingly by the Department, states the ground upon which all these decisions are based, as follows:

"The long connection of Mrs. Harner and her husband with the land, and the apparent good faith and the diligent effort to comply with the

homestead law, raise equities which cannot be disregarded."

Here we have in these decisions, in effect, the admission of the local officers, the Commissioner and the Secretary, that there is no law under which Mrs. Harner had any rights, but she has "equities which cannot properly be disregarded."

It should not be necessary to cite decisions of this Court to show these officers have no power to grant, or in any way encumber a single acre of the public lands except upon affirmative act or acts of Congress, and then only upon the exact terms and conditions prescribed by such acts, *"whether they be hard or lenient."*

Marquis v. Frisbie 101 U. S. 473; Daniels v. Wagoner 237 U. S. 547, and late decisions following it.

Moreover, as we have seen, she had no equities whatever.

In the case of Bray v. Colby, under the heading of "Deserted Wife," decided by Secretary Teller (3 L. D. 78) referring to another case, it is said:

> In the latter case the ground of the decision is that Rule 27 of the Rules of the Board of Equitable Adjudication recognizes the wife's equities and affords her relief. *The reasoning is unsound*, first because if the wife has no *legal rights* she can have "no equities."

This case is quoted approvingly by this Court in Vance v. Burbank, 101 U. S. 574, and also cited in Steele v. St. Louis Smelting Co. 106 U. S. 447 and in Moffit v. U. S. 112 U. S. 24.

> "It is the duty of the Department to recognize such equities, and only such, as the courts recognize."

Brown v. Hitchcock 173 U. S. 473, quoted approvingly in Aztec Land and Cattle Co. v. Tomlinson 35 L. 161.

All this is in explanation of a former decision of the Department wherein, in the absence of any charges of fraud or wrongdoing, stated "the Department is not convinced that he (Brady) was there in good faith." Of course, he could not have used the term "good faith" in its usually accepted meaning, as well as its legal definition by the courts and standard writers. It is the opposite of "bad faith" and bad faith is fraud, which was impossible, since it is conceded he had a legal right to settle and occupy the land, subject only to the preference right of Harner, if exercised in the remainder of the 30-day period left him, and when he failed to exercise it, the land became at once public land subject to settlement by any qualified person.

Suppose Brady had made full inquiry before settlement and had consulted an attorney as insisted he should have done, he would have obtained no intimation that Lillie S. Harner would seek to obtain the title. Again, suppose that on the day after the expiration of Harner's preference right he had gone to the land office and offered to make entry, stating he was living on the land with his family? Would it not have been valid not only against Larson, Harner, and Mrs. Harner, but against the whole world.

The rule as to what is necessary to sustain fraud is thus stated in C. Y. C. Vol 20, p 21:

> "As a general rule false representations upon which fraud may be predicated must be of existing facts, or facts which previously existed, and cannot consist of mere promises or conjectures as to future acts or events, although such promises are subsequently broken, unless the promise

includes a misrepresentation of existing facts or the statement is as to some matter peculiarly within the speaker's knowledge, and he makes the statement as a fact. Whether a false statement of intention may be actionable appears not to be definitely settled. * * * * * On the other hand, it is held that a statement of intention is merely a promissory statement and therefore is not actionable, although false."

See McAllister v. Indianapolis, etc. R. Co., 15 Ind. 11; Tanner v. Clarke 13 Ky. L. Rep. 922. And see cases cited in preceding notes. As distinguished from the false representation of a fact the false representation as to a matter of intention not amounting to a matter of fact, although it may have influenced a transaction, is not a fraud at law. Gage v. Lewis, 68 Ill. 604 (quoting Kerr Fr. & M. 88).

In the case of Magee v. Manhattan Insurance Co. 92 U. S. 98, the Court held:

> "To constitute fraud the intent to deceive must clearly appear. Fraud is not presumed."

In Cains v. Nicholson 9 How. 364, is said:

> "A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud."

See also Lalone v. United State, 164 U. S. 255, which was a pension case in which it was said:

> "But even if we were satisfied from the evidence that the accident took place as described by these witnesses, we should still feel that the case on the part of the government had not been made out with that clearness which is requisite in order to base a finding of fraud."

In Nelson v. Steero 192 Pa. St. 581, it is said:

> "Insinuations and suspicions are not evidence, and strictly speaking, they have no place in it. They certainly do not constitute a proper basis for a verdict in accordance with them."

In United States v. Col. Coal & Iron Co. 123 U. S. 307, the Court said:

> "The proof of a fraud which would render their title void should be stronger than the legal presumption upon which they rest."

From these authorities the following rules may be deduced:

1st. The intent to deceive must clearly appear.

2nd. There must be some one to deceive and defraud.

3rd. The acts, facts and circumstances constituting the fraud must be stated and clearly proven.

4th. A mere preponderance of evidence is not sufficient.

5th. Insinuations and suspicions constitute no basis for a verdict in accordance with them.

6th. A charge of fraud cannot be sustained by mere insinuation and suspicion, strained inference, doubtful or suspicious circumstances, or mere conjecture; and evidence which produces a vague misgiving is not enough.

The last sentence covers all there is in this case, and such evidence is not sufficient, in fact as said by the Court in Nelson v. Steen, *supra*, "they have no place in it." With all the efforts of the Department in its attempt to sustain its finding and decision it failed to set out a single act, fact or circumstance in Brady's connection with the land that would fall un-

der the head of insinuation or suspicion, strained inference, doubtful or suspicious circumstances, all together not being sufficient to produce a vague misgiving, clearly insufficient.

But, it is also said that he did not consult a lawyer and bring his contest for a long time after Larson notified him of his entry. Certainly that was none of the business of the Department, nor of Larson. In the whole decision there is not a single suspicion of fraud pointed out. And yet the man's good name is blasted and his property taken from him and given to another, who was and is without right, and who, he probably did not know and could not have intended to defraud. And yet she profited by this illegal action, at the expense of Brady.

Moreover, it has been the uniform holding of the Department and of the Courts that good faith of settlers, or residents, on the public land is always presumed. This presumption protects him unless and until the contrary is clearly shown. U. S. v. Col. Coal and Iron Co. *supra,* Prevost v. Gratz (6 Wheat 498):

> "To constitute fraud, the intent to deceive must clearly appear. Magee v. Manhattan Life Ins. Co. 92 U. S. 98.
>
> "It has frequently been held that fraud ought not to be presumed, but must be proved. Kempon v. Churchill 8 Wall 369."
>
> "Fraud is a conclusion of law from facts. They must necessarily tend to such conclusion. Evans v. U. S. 153 U. S. 600."
>
> See also Thompson v. Brown 4 Wall 472; Haar v. Thomson, 1 Black 91; Johnson v. Walters 111 U. S. 667.

Who did Brady intend to defraud by his occupancy of the vacant house and the vacant lands? Not Har-

ner, for he settled subject to the exercise of his preference right within the time allowed therefor by law.

Not Larson, for he was not then known in the case and had no connection with it until he made entry Feb. 17, 1919, a month and a half after Brady's settlement and residence.

Not Mrs. Harner, for she was equally unknown to him and so continued up to the day of the filing of her petition to intervene, April 14, 1919, when he first learned of her claim.

Therefore, the most important element of fraud, viz. some one to be defrauded and the intent to defraud, without both of which clearly proved there can be no fraud, are entirely lacking. Then where is the fraud—the wrong doing?

VII.

It is claimed in the motion to dismiss that this proceeding cannot be allowed because it is in effect a direct review of the action of the defendants, which involved the exercise of judgment and discretion; and that the court is without jurisdiction to review and control the defendants in matters involving the exercise of their judgment and discretion.

This claim is based upon the theory that however plain and unambiguous the language of an Act of Congress may be, both as to what is provided and the exact method of its execution, it is within their discretion and judgment to disregard and refuse to consider a single one of these requirements, and that when they do so, the courts have no discretion to consider such case in this proceeding.

We have shown that Mrs. Harner, in whose favor all the decisions have been rendered, did not comply with a single requirement of the only statute that by

virtue of a strict compliance with all its requirements she could have any claim, not only against either of the parties to the case, but *against the government in a strictly ex parte case.*

Every decision may be examined and although the view was constantly pressed, it evidently seemed to the officials of the Department that this claimed discretion and judgment, which cannot be interfered with, justified them in entirely ignoring the statute, never even mentioning it, or any other law under which she acquired any right whatever. This view, as stated by this Court in Roberts v. United States 176 U. S. 221, is insisted upon, "*no matter how plain its language nor how plainly they violated their duty in reference to performing the Act required.*" (The italics are ours) This decision was quoted approvingly by Mr. Justice Van Devanter in the late case of Lane v. Hoglund (244 U. S. 174) In Frisby v. Whitney, the broad doctrine is correctly laid down as follows:

> "The rights created by statute, must be governed by their provisions, whether they be hard or lenient." (Italic ours)
>
> See Rector v. Ashley (6 Wall 73 U. S. 326); U. P. Railway Co. v. United States (known as the Sinking Fund cases), (99 U. S. 718), by Chief Justice Chase; Nolan v. Carr 125 U. S. 618; N. P. Ry. Co. v. McComas 250 U. S. 387; Payne v. Central Pacific Ry. Co. 255 U. S. 228 and Payne v. New Mexico, 255 U. S. 367.

In Roberts v. U. S., supra, it is held:

> "A ministerial duty arises when an officer has no discretion as to whether or not he shall perform it, even though the officer must construe the law, to find out what he must do."

See also Noble v. Union Logging Co. 147 U. S. 165; American School v. McAnnulty 187 U. S. 94; Marquez v. Frisbie 101 U. S. 473; Gaines v. Thompson 74 U. S. 5, construing the decision of Marbury v. Madison (1 Cranch 137).

There is no contention in any of the decisions that Mrs. Harner complied with any law, decision, rule or regulation by or under which she legally acquired any right to make an entry in her own name, and thereby deprive Brady of his rights as a contestant of Larson's entry, or his rights based upon his settlement and residence with his family on the land. If there had been, with all the boasted *four* decisions by the Department in her favor some one would have been pointed out, especially when in briefs preceding each, it was challenged to do so.

As herein pointed out, the local officers alone gave a clue to all of the other officials when it was said the case was so complicated that they did not know the status of the case, but that Mrs. Harner had more right to the land than the contestant or the contestee. This is the moving cause of all of the decisions, and yet *she had no equities.* Incompetent evidence was permitted to be given over the objection of Brady's attorney (Tr.) that she had taken the land as a homestead and had sufficient residence to make final proof and large improvements (the cabin being about the only visible improvement) but when she attempted to make final proof she ascertained she was not a citizen and could not get title. She admitted she knew she had the right to sell her relinquishment and probably could have sold it for enough to repay her, but for some unexplained reason she went with her brother to the local office and gave her relinquishment to Rattskammer, one of her brother's hired men, who immediately made entry of the land, and she swore she got

nothing for it. It follows she had *no equities.* It is also clear all testimony in reference to it was totally incompetent, as by the filing of her relinquishment she parted with all her rights to the land which, *eo instante,* became a part of the public domain, free from any claim she ever had, and this evidence was dragged into the case solely to create the impression that she had great equities. Evidently that was the view taken by the local officers, and, without so stating, was elaborately set forth and approved by the Departmental decisions. It follows that by her own admission, she had neither legal nor equitable rights in her behalf, and all reference to it was to give her some additional claim on this account. Otherwise, the Department would have stated that it was incompetent and should not be considered, instead of the contrary, as we have seen. But without a single right or equity of any kind, she is given title under a law which requires strict compliance with all of its provisions, regardless of the rights, both legal and equitable of Brady under both his residence and his successful contest.

And now we are told that because these officials object to Brady's action against them for these unlawful acts solely in their official capacity, they have the right to prevent this proceeding because the party who was permitted by them to intervene at the eleventh hour, now sits back and protects them from any consideration of their acts, as said in Roberts v. U. S., supra,

> *"No matter how plainly they violated their duty in refusing to perform the acts required."*

There is no way to compel her to come in. It looks like a travesty on justice for one who was permitted unlawfully to interfere in a plain statutory contest,

and who alike unlawfully was awarded the land, by executive officers, they can prevent the injured party with a plain statutory right to, when, as said by Mr. Justice Hughes in Philadelphia Co. v. Stimson, Secretary of War, supra.

> "The complaint did not ask the court to interfere with the official discretion of the Secretary of War, but *challenges his authority* to do the thing of which complaint is made. The suit rests upon the charge of the abuse of powers, and its merits must be determined accordingly" (Italic ours). T. Lane v. Watts 234 U. S. 525.

So in this case, if the Department had *the power* to reject Brady's statutory legal right, or to allow Mrs. Harner's entry without any compliance with any law, rule or regulation, what could she do if present to prevent the Court from saying so, and proceeding to undo the wrongful acts of these officials in her behalf than could they, with all the weight of the Federal Government behind them. It has been said that instead of this plea they should have been willing to welcome the fullest investigation by the courts of their alleged unlawful acts and not hid, as it were, behind this anomaly in our judicial system which provides no way to get service on her, and thus deprive a settler and successful contestant of his legal statutory rights, creating another anomaly in our jurisprudence, of a party with a "right, but with no remedy in the courts." If this is sound law a change is badly needed. For this reason all the courts as well as the law writers sanction the granting of these writs whenever it can be done between parties before the courts, without injury to others not parties. If she has no rights, either legal or equitable, under any law, and Brady has two statutory legal rights, one under his

settlement and residence and the other a preference right under his contest, or either of them, it would seem the court would have little difficulty in determining whether these officers correctly performed their duties which must be fixed by law. It comes back to the proposition that they have a discretion to obey the law, and award the land to the person entitled to it, or disregard it and in the language of Chief Justice Marshall in Marbury v. Madison, supra.

> "When the rights of individuals are dependent upon the performance of these acts (prescribed by statute); he is amenable to the laws for his conduct; and cannot *at his discretion sport away the vested rights of others.*" (Italics ours)

We have already considered, to some extent, the objection to Brady's settlement rights, but it is important that in urging his claim based thereon to defeat and cancel Larson's entry, the Department included in its statement that he was bound by law to take notice of his occupancy, added *and the alfalfa field* rented to Brown, as if it were necessary to add anything to Brady's occupancy or even proper to do so. How could 20 acres of the tract in alfalfa, not even shown to have been fenced, and requiring no cultivation, when the house and all other parts of the tract was completely abandoned, affect the right of Larson, or any other qualified person to enter? If it could prevent Larson, or any one else from homesteading it one day after Harner's preference right expired, it could prevent its disposal by the Government for one year, or indefinitely, which proposition is absurd. It could not be so held. Then why insert it? If it had been sufficient the charge of lack of good faith would have been unnecessary, for Larson's entry would have been sustained on account of it by the exercise of dis-

cretion. Is this by the exercise of discretion "sporting away the vested rights of others" to which Chief Justice Marshall referred?

There can be no dispute about his intention to take the land as a homestead when he commenced his contest against Larson's entry. Neither was he required in his contest to show his purpose in making settlement, for as held, Larson was bound to take notice of his occupancy of the land and his residence in the house on the land, and to know his purpose before making his entry. This was so held by all of the decisions. It could not be held Larson's entry was canceled upon the intervention of Mrs. Harner, for the reason she did not become a second contestant, which she might have done, neither did she make any charges whatever against either Brady or Larson.

Suppose Brady had applied to enter the day after the expiration of the preference period? Would not his entry have been allowed and would it not have been valid? Most certainly it would. Then why not his settlement? How could Mrs. Harner obtain any kind of claim, as a deserted wife or otherwise? It is impossible. (9 L. D. 70; 10 L. D. 297, 11 L. D. 202.)

In fact, under these decisions, he might have made application for entry as well as settlement, and residence. In the case of George Premo, 9 L. D. 70, is is held:

> "An entry may be allowed subject to the preferred right of a successful contestant, and if said contestant fails to exercise his right within thirty days after notice of cancellation such entry will be held good as against the contestant."

BRADY'S STATUTORY RIGHTS.

As hereinbefore stated, if Brady at the date Mrs.

Harner intervened, had a statutory right under either his settlement and residence with his family on the land, more than three months theretofore, or if he acquired a statutory right by his contest and the cancellation of Larson's entry upon his contest, it is totally immaterial whether Mrs. Harner had any rights or not for, as we have seen, and as must be considered fully settled, the Land Department has no power whatever to deny to anyone entitled thereto a right obtained under statutory provision, and whatever action may have been taken to that end, or whatever action has been taken in favor of Mrs. Harner against such statutory right, is *ultra vires* and absolutely void and madamus will lie.

Upon this broad, settled doctrine, we rest Brady's case. There is no dispute that he settled on the land with his family about January 1, 1919, and has remained there fully complying with the law ever since; that while thus residing on the land occupying the vacan house left by Harner's, and which Mrs. Harner swore was *not rented,* which was also corroborated by Brown to whom Harner had rented a twenty-acre alfalfa field, by his statement that the house and other premises were *not included.*

There can be no dispute about his intention to take the land as a homestead when he commenced his contest against Larson's entry; neither was he required in his contest to show his purpose in making settlement, for as held, Larson was bound to take notice of his occupancy of the land and his residence in the house on the land, and to know his purpose before making his entry. This was so held by all of the decisions. It could not be held Larson's entry was cancelled upon the intervention of Mrs. Harner, for the reason she did not become a *second contestant, which she might have done;* neither did she make any

charges whatever against either Brady or Larson.

BRADY HAS AN ADEQUATE REMEDY.

But, it is insisted this proceeding must be dismissed, because the plaintiff has an adequate remedy at law after patent issues. As to this defense, High on Injunctions, a standard authority, states the rule as follows:

> To deprive a plaintiff of the aid of equity by injunction, it must also appear that the remedy at law is plain and adequate; in other words, that it is as *practical and efficient* to secure the ends of justice and its proper and *prompt administration* as the remedy in equity, and *unless this is shown* a court of equity may lend its extraordinary aid by injunction, notwithstanding the existence of a remedy at law. Citing Woodward v. Woodward 169 U. S. 466, 76 Fed. 385; Watson v. (148 Mo. 241-49 S. W. 1001) and Smyth v. Arms 5 Wall, 74; Walla Walla v. Walla Walla Water Co. 172 U. S. 1 and a number of other cases. (Italics ours)

Joyce on Injunctions states the rule in practically the same terms, and adds in Section 353, that—

> "One with special injury may enjoin a public mission."

At Section 361 Vol. 1, he states the rule settled by the Indiana Supreme Court to be

> "that a taxpayer may enjoin an unlawful tax if it increased his burdens of taxation, (citing a long line of decisions), from doing an illegal act and transcending their lawful powers—Clay County Commissioners v. Markle (46th Indiana 96). It has been settled in the state that the remedy may

be had by any taxpayer in his own name."
Note 19—Also 32 Indiana 244.
34 Ind. 115; Noble v. Vincennes 42 Ind. 125; Jager v. Daugherty 61 Ind. 528.

New York courts hold the same. See

Kilbourne v. St. John 59 N. Y. 21 and the same v. Allen. Such relief is also given by Statute of 1872, Ayers vs. Laverman 59 N. Y. 192.

Can it be said the remedy at law is either "as plain and adequate" or as "practical and efficient" to secure the ends of justice, or as "prompt in administration" as the remedy in equity. Unless this is "shown" a court of equity may lend its extraordinary aid by injunction notwithstanding the existence of a remedy at law. On the contrary, there may be no remedy at law at all, there certainly is none now open to the plaintiff. If Mrs. Harner should relinquish, will counsel be kind enough to tell us what remedy he would have at law? The whole theory is based upon the presumpion that she will obtain patent, which she may never do. As to promptness, it would take at least five years to reach the Supreme Court in an action to hold her as trustee, involving many times the amount of cost. In this case we have the mere assertion that "plaintiff has the usual, complete and wholly adequate remedy of a suit against her to charge said patent with a trust in his favor." Is this sufficient?

CONCLUSION.

So far as Brady's rights are concerned, there is only one fact about which there is any dispute, viz. his intention in making settlement and establishing residence with his wife and children on the land at a time when it is conceded it was public land open to settle-

ment or entry.

1. Even if be conceded he originally had no such intention, it will be admitted that he could at any time thereafter have legally determined to take it as a homestead. Rife v. Anderson, decided June 14, 1921, not reported.

2. That he did so determine prior to or on the 13th day of March, 1919, when he filed his contest against Larson's entry, will be admitted.

3. That this was more than two months before Lillie S. Harner filed her application to intervene, viz. April 14, 1919, is shown by all the decisions and not disputed by any one.

4. In his contest affidavit he states he settled on the land and established homestead residence with his family about January 1, 1919.

What is the legal effect of these undisputed facts as it concerns the Government and Lillie S. Harner, or any other person not having a superior right? Stripped of all other matters this is the real question involved in the case.

It is conceded his contest was duly accepted, notice issued and served and the issues made up by filing of answer by Larson, the entryman, prior to Mrs. Harner's petition to intervene.

In Mott v. Coffman (19 L. D. 106) the Department held:

> "Any person may contest an entry in the interest of the Government, and the question of his qualifications to enter the land is not in issue until such time as he may apply to exercise the preferred right of entry accorded to the successful contestant."

In the case of David A. Cameron (37 L. D. 450), after a full consideration of the whole subject, it was

held that such right could be defeated only by a withdrawal of the land by the Government before it was exercised.

The *mandatory* provisions of the statute (May 14, 1880) provide:

> "In all cases where any person has contested * * * * and procured the cancellation of an entry he *shall* be notified of the cancellation and shall be allowed thirty days from date of such notice *to make entry* of said lands." (Italics ours)

It is clear this is a statutory right and beyond the power of the Department to defeat. (Philadelphia Co. v. Simpson, supra; Noble v. Union Logging Co.; American School v. McAnnulty; Daniels v. Wagner, and Payne v. Central Pacific Ry. Co. supra, and Wells v. Fisher, 47 L. D. 288 and cases cited.

It would be incompatible with justice and equity, as well as a species of *bad faith* to hold out to citizens this promise, and after inducing them to expend their money on the faith of the reward so positively promised by law, to say that the Government might, *even for its own use, take back its promise,* as sometimes said "Indian fashion." It would be what the Supreme Court said in Union Pacific Ry. Co. v. U. S. supra, "a repudiation of their obligation, which is as much repudiation with all the *wrong and reproach* that the term implies as it would be if the repudiator had been—a citizen."

Was Mr. Justice Brewer right when announcing the opinion of this great Court in Gulf, Colorado & Santa Fe R. Co. v. Ellis, 165 U. S. 150? He said:

> "No language is more worthy of frequent and thoughtful consideration than these words of Mr.

> Justice Matthews, speaking for this Court, in Yick Wo. v. Hopkins, 118 U. S. 536, 369 (30; 220, 226): 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power'."

Our great Daniel Webster, in a speech made by him upon his returning to his native town speaking to his people, and pointing to the west, said:

> "Yonder, my friends, you see a mountain whose peak rises above us; still farther west is another whose crowning point is higher still. Higher yet is the eagle's flight; but *above all* is the *eternal principles of justice.*"

If this doctrine is maintained by the Court in this case, there can be no doubt of its decision.

Respectfully submitted,

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